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*Attorney for Defendants U.S. EPA and its  
 Administrator*

IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO BAYKEEPER; SAVE  
 THE BAY; COMMITTEE FOR GREEN  
 FOOTHILLS; CITIZENS' COMMITTEE  
 TO COMPLETE THE REFUGE; and STATE  
 OF CALIFORNIA, by and through  
 XAVIER BECERRA, ATTORNEY GENERAL,

Plaintiffs,

v.

U.S. ENVIRONMENTAL PROTECTION  
 AGENCY AND ITS ADMINISTRATOR,

Defendants,

REDWOOD CITY PLANT SITE, LLC,

Intervenor-  
 Defendants.

Case No: 3:19-cv-05941-WHA (lead case)

Consolidated with

Case No: 3:19-cv-05943-WHA

**NOTICE OF FILING CERTIFIED  
 INDEX TO THE ADMINISTRATIVE  
 RECORD**

Pursuant to the Court's direction at the January 2, 2020 case management conference; the parties' January 13, 2020 supplemental joint case management statement; Local Rule 16-5; and, by analogy, Federal Rule of Appellate Procedure 17(b), the defendants, United States Environmental Protection Agency and its Administrator (collectively, "EPA"), hereby file the certified index to the administrative record for purposes of judicial review of EPA's March 1, 2019 special-case Clean Water Act jurisdictional determination pertaining to 1,365 contiguous acres comprising the Redwood City Salt Plant site in Redwood City, San Mateo County, California.

1       The United States acknowledges the Court’s direction that, if and to the extent that the  
 2       United States is asserting a claim of privilege associated with the administrative record, any such  
 3       claim must “at least be on the privilege log.” Tr., Case Management Conference (Jan. 2, 2020), at  
 4       15:1-4; *see also id.* (“That the way I would rule. I have no doubt about that.”). However, there is  
 5       no requirement for the United States to assert a claim of privilege under EPA’s definition of the  
 6       administrative record, which is: “the set of non-deliberative documents that the decision-maker  
 7       considered, directly or indirectly (e.g., through staff), in making the final decision.” *Id.* at 12:5-8,  
 8       counsel for the United States quoting EPA’s *Administrative Records Guidance* (Sept. 2011) at 4.

9       In accordance with that definition, deliberative documents, i.e., documents reflecting the  
 10       agency’s or agencies’ pre-decisional deliberative process, are not part of the administrative record  
 11       and therefore need not be listed on a privilege log (because, *inter alia*, deliberative documents  
 12       generally are not relevant to Administrative Procedure Act review, and including them in the  
 13       administrative record would inhibit agency decision-making). This definition accords with *San*  
 14       *Luis Obispo Mothers for Peace v. Nuclear Regulatory Commission*, 789 F.2d 26, 44-45 (D.C. Cir.  
 15       1986) (en banc), which, as far as we have been able to glean, is the only court of appeals decision  
 16       to have addressed the question.

17       As this Court has observed, the Ninth Circuit “has not spoken on the issue.” *Regents of*  
 18       *Univ. of California v. U.S. Dep’t of Homeland Sec.*, No. C 17-05211 WHA, 2017 WL 4642324,  
 19       at \*7 (N.D. Cal. Oct. 17, 2017). However, the Ninth Circuit has approvingly cited the foregoing  
 20       D.C. Circuit decision, though distinguished it on its facts. *See Portland Audubon Society v.*  
 21       *Endangered Species Committee*, 984 F.2d 1534, 1549 (9th Cir. 1993) (“Unlike the documents  
 22       requested in *Mothers for Peace*, those sought here concern neither internal deliberative processes  
 23       of the agency nor the mental processes of individual agency members.”).

24       *Regents*, where this Court ordered the United States Department of Homeland Security to  
 25       produce a privilege log, is distinguishable. In *Regents*, the Court found that the agency had  
 26       produced a deficient administrative record. *See, e.g.*, 2017 WL 4642324, at \*3-\*5 (“Here, the  
 27       tendered administrative record consists merely of fourteen documents spanning 258 pages . . . .  
 28       [P]laintiffs have clearly shown that defendants excluded highly relevant materials from the

1 administrative record and in doing so have rebutted the presumption that the record is  
2 complete.”). Here, EPA is producing a voluminous administrative record that has been certified  
3 to be complete and in accordance with the agency’s definition of an administrative record. Thus,  
4 consistent with *Regents*, unless and until a party files a motion that seeks to rebut the presumption  
5 that the record is complete; the United States has a full and fair opportunity to respond; and the  
6 Court issues a ruling, no privilege log or other relief associated with EPA’s administrative record  
7 should be ordered.

8 Accordingly, attached to this Notice are the following documents: (1) EPA’s  
9 *Administrative Records Guidance* (Sept. 2011), cited above; (2) a certification by the appropriate  
10 EPA official; and (3) the certified index to the administrative record.

11  
12 Dated: March 2, 2020

Respectfully submitted,

/s Andrew J. Doyle

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